IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 110

THE ALTON RAILROAD COMPANY, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND JOHN P. FLEMING, DOING BUSINESS AS JOHN P. FLEMING DRIVE-AWAY SERVICE,
Appellees.

No. 267

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND JOHN P. FLEMING, DOING BUSINESS AS JOHN P. FLEMING DRIVE-AWAY SERVICE,
Appellants,

vs.

THE ALTON RAILROAD COMPANY, ET AL.,
Appellees.

APPEAL AND CROSS-APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

BRIEF OF THE RAILROADS, APPELLANTS IN NO. 110 AND APPELLEES IN NO. 267, REPLYING TO BRIEFS OF THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION AND JOHN P. FLEMING.

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Scope of This Reply Brief.

Our first brief was entitled in No. 110 only, but we included in it our arguments on the points involved in both the appeal and the cross-appeal. This brief is in reply to

the arguments, attacking our contentions in both appeals, contained in the joint brief of the United States and Interstate Commerce Commission and in the briefs of John P. Fleming.

1.

Plaintiffs Are Parties in Interest Entitled to Maintain This Suit.

(A) EFFECT OF SECTION 222 (b) OF PART II OF THE INTERSTATE COMMERCE ACT.

It is urged (U. S.-Comm. Br., p. 30) that since Section 222 (b) of Part II, 49 U. S. C. A. 322 (b), authorizes the Commission to sue to enjoin violations of some of the provisions of Part II and of orders of the Commission, and since the section confers this right on no one else, this operates by construction to exclude from the scope of Section 205 (g) the right of any person to obtain review in court of an order of the Commission authorizing "grandfather" rights. The unsoundness of this proposition can be demonstrated in a number of ways.

(1) Vesting in the Commission the exclusive right to initiate the proceedings in court described in Section 222 (b) does not evidence any legislative intent to deny to a private party the right to have reviewed in court an order of the Commission involving the subject matter of the Section. At the most it means that *primary jurisdiction* of the subject matter of the section is delegated to the Commission, and that resort may not be had to the courts by a private individual until after the Commission has made an order in the premises. This is demonstrated by familiar principles.

By virtue of Section 204 (c),[1] formerly 204 (d), any per

1. SEC. 204-(c). Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission,

son may make a complaint to the Commission respecting the subject matter of Section 222 (b). Section 204 (c) is similar to Section 13 (1) of Part I. Under 13 (1) a private person may file a complaint with the Commission with respect to a subject matter within the primary jurisdiction of the Commission. A court would have no jurisdiction of that subject matter originally. But after the Commission, pursuant to the complaint, makes an order, a party in interest may then properly seek a review of that order in court. See *Armour & Company* v. *Alton Railroad Company*, 312 U. S. ; Sharfman, The Interstate Commerce Commission, v. II, p. 406.

We may therefore assume, for purpose of argument, that by virtue of Section 222 (b), or some other reason, a private party may not originally resort to a court to determine whether a motor carrier is operating lawfully, since this question is within the primary jurisdiction of the Commission. Upon that argumentative assumption rights similar to those in that part of Section 1 (20) which permits parties other than the Commission to resort originally to a court are not carried into Part II. But we are not here concerned with original resort to a court. Rather, there is here involved another element of Section 1 (20), the right declared in *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382, that a competitive carrier may have a judicial review of an order of the Commission granting a certificate. That right is carried into Part II because it is a "right of relief in court * * * now provided in respect to orders of the Commission made under Part I," Section 205 (g). That right cannot be construed away by Section 222 (b) because that right is a right to review of a Commission order, while Section 222 (b) at

after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

the most only defines *primary jurisdiction* of the Commission.

When Section 205 (g) was enacted there existed under Part I the well understood right of "any part in interest" to review in court an order of the Commission granting operating authority, and language to bring that right into Part II could not have been phrased more aptly than in 205 (g).

(2) Section 222 (b) gives the Commission power to enforce the Act and its orders by injunction. It authorizes action by the Commission only against other parties. Section 205 (g) is precisely the converse. It permits a review of a Commission order by "*any* party in interest"; that is, action against the Commission. The two sections are so utterly dissimilar in purpose that the first named cannot diminish any part of the right of judicial review provided by the second.

(3) In construing these sections it is highly pertinent to consider the respective histories of Parts I and II of the Act. Part I as it stands today is the result of slow evolution from small beginnings in 1887.[2] For the first 20 years the Commission had no power to fix rates.[3] Authority to establish maximum rates was conferred in 1906,[4] and to fix minimum rates in 1920.[5] The certificate provisions of Section 1, § (18), (19), and (20), were part of the Act of 1920. The Elkins Act in 1903,[6] and the Mann-Elkins Act in 1910,[7] were important steps in requiring adherence by railroads to their tariffs and broadening the Commission's control over tariffs.

2. 24 Stat. 379.

3. *Cin., N. O. & T. P. Ry.* v. *I. C. C.*, 162 U. S. 184 (1896); 167 U. S. 479 (1897).

4. Hepburn Act, 34 Stat. 584.

5. Transportation Act of 1920, 41 Stat. 456.

6. 32 Stat. 847.

7. 36 Stat. 539.

In contrast, Part II was enacted in 1935 as one whole piece of legislation embodying all of the above mentioned features of Part I. As a consequence Part II, though all inclusive, is simpler in form and far less repetitious than Part I.

The point of the foregoing is that since Congress built Part II as one piece on the pattern of Part I, it plainly brought into Part II by Section 205 (g) just what the Section says, "the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under Part I."

(B) RAILROADS ARE COMPETITORS OF DRIVEAWAY MOTOR CARRIERS.

It is argued (U. S.-Comm. pp. 32-33; Fleming, Nov. 27, pp. 12-13) that there is such a difference between driveway and railroad transportation of automobiles that the two are not competitive; and therefore the railroads have no standing, as competitors for traffic, to maintain this suit.

In view of the facts this argument is so lacking in foundation as to make it doubtful whether the parties who urge it are really serious about it. The Commission, and the motor carriers, have always taken the position that railroad and driveaway transportation of automobiles is fiercely competitive. As pointed out in our first brief (p. 19) the Commission is now engaged in an investigation (in Docket No. 28190, *New Automobiles in Interstate Commerce*) of rates charged for the transportation of new automobiles by railroads and motor carriers, including driveaway carriers, and the relation, if any there should be, between their respective rates.

In *Automobiles from Wisconsin to Minnesota*, 246 I. C. C. 114, I. & S. No. 4943, rates on new automobiles from Kenosha, Wis. to Minneapolis and St. Paul, filed by railroads to compete with motor carriers, both driveaway and truck-

away, were suspended by the Commission on complaint of the National Automobile Transporters Association, Inc. After investigation the order of suspension was vacated and the proposed rates were permitted to become effective. The Commission's report states in part:

> "Prior to November 1937 substantially all of the traffic considered was handled by railroads, but from that time until November 1940 nearly all of it was handled in driveaway service. In November 1940 the bulk of the traffic returned to the rails. In 1941 up to May 19, 123 carloads moved by rail and 30 truckloads moved by truck."

In *Automobiles from Evansville, Indiana, to the South*, 245 I. C. C. 339, I. & S. No. 4835, protest by motor carriers caused suspension of railroad carload rates on automobiles, although the rates were later permitted by the Commission to become effective. The competing motor carriers were truckaway and not driveaway operators. The Commission said (p. 346):

> "Our action herein is without prejudice to the conclusions of the Commission in Docket No. 28190, *New Automobiles in Interstate Commerce*, now pending."

(c) EFFECT OF RAILROADS' PARTICIPATION IN PROCEEDINGS BEFORE THE COMMISSION.

Argument is made that participation by the railroads in the proceedings before the Commission does not give them standing to maintain this suit (U. S.-Comm. pp. 36-40; Fleming, Nov. 27, pp. 15-16). We did not argue this point at any length in our first brief. The last word on this subject seems to be that cited in our first brief, p. 21. With reference to the various cases cited by opposing parties, we think they are answered by a quotation from one of them, *Moffat Tunnel League* v. *United States*, 289 U. S. 113, where the Court said (120-121):

> "The case is utterly unlike *Chicago Junction Case*,

264 U. S. 258, 267; *Western Pacific Cal. R. Co.* v. *Southern Pacific Co.*, 284 U. S. 47. and *Claiborne-Annapolis Ferry* v. *United States*, 285 U. S. 382. In each of these a carrier brought suit to set aside an order of the Commission."

We submit that a competing *carrier* who has appeared in the Commission proceedings is, by virtue of that fact, a "'party in interest' in the further pursuit of claims before a court after adverse action by the Commission," *L. Singer & Sons* v. *Union Pacific Railroad Company*, 311 U. S. 295.

2.

The Commission's Order Should Be Annulled.

It is plain from opposing briefs that there is no dispute as to the facts. The statements of the simple and readily understandable facts in our first brief are not criticized. The fundamental question is therefore one of law; whether the operations of a carrier have been those of a common carrier is a question of law, *Producers Transportation Co.* v. *Railroad Commission*, 251 U. S. 228. The definition of a common carrier made by Section 203 (a) (14) of Part II embodies the common law conception. See *Producers Transportation Co.* case, *supra*.

Opposing briefs (U. S.-Comm. pp. 40-55; Fleming, Dec. 10, pp. 2-41) lay much stress upon the discretionary power of the Commission and the special type of Fleming's operations. Both of these factors may be accorded due weight, but they cannot engulf the simple, undisputed, and dominant facts of Fleming's operations. These operations were so meager throughout the entire west and in parts of the southeast as to make any theory that they constituted common carriage clash violently with any ordinary and regular conception of that status.

As an argument that the few shipments carried to points in the west are, nevertheless, sufficient to establish that Fleming was in actual operation as a common carrier to those points throughout the "grandfather" period, both briefs refer to the point that "in view of the marketing characteristics of the industry * * * his service is not one for which there was steady demand." (U. S.-Comm. p. 43; Fleming, Dec. 10, pp. 15-16.)

Now it is common knowledge that there was a steady demand for the transportation of automobiles from Detroit to the points Fleming served, and that a large volume of the automobiles transported moved by driveaway. See pp. 19, 37, our first brief. The few deliveries shown on page 26 of our first brief not only prove that there was no steady demand for Fleming's service but that there was during the 18 months preceding July 23, 1936, no appreciable demand. His service, against the background of the potential demand, consisted simply of sporadic trips that could not be called service to the general public. The fact that "*his* service is not one for which there was steady demand" (emphasis supplied), is simply a confession that while there was a huge demand by the general public for the transportation of automobiles, *his* service was not in demand; that is, *he* was not serving the general public as a common carrier.

As reason for justifying the authorization to serve all points in the west and southeast, although shipments had actually been carried to only a few points, opposing counsel rely on language of the Commission to the effect that "distribution points are constantly shifted from the standpoint of a state-wide area, dealers' accounts are changed, and the volume of sales at a given point may show rapid increases or decreases." (U. S.-Comm. pp. 44, 51-53; Fleming, Dec. 10, pp. 10-14; R. 13.)

This finding (1) is directly contradicted by the undis-

puted facts, and (2) is insufficient justification in any event. Fleming's shipments to Washington, Oregon, and California cover a period of almost two years and there is no evidence of shifting of distribution points. Rather, there are in Washington, and to Portland, Oregon, shipments at long intervals to the same points, and to California and the rest of Oregon, isolated shipments to single points of such few vehicles as to show that no dealer was being served to any consequential extent. The same thing is true with respect to the other states. See our first brief, pp. 48-60. If there had been a "shifting around" sufficient to justify the Commission's theory it would show in the record of shipments.

However, it is submitted that this theory is fundamentally unsound. For instance, a dealer may have actually served Seattle during the "grandfather" period, but it is submitted that the question whether he should be allowed to serve Spokane, which he did not serve during the "grandfather" period, should be determined on grounds of public convenience and necessity Otherwise every carrier that has served any city in the state will have "grandfather" rights to every other city regardless of public need therefor.

3.

The Decree Should Be Affirmed as to Arkansas.

The U. S.-Commission brief states (p. 66): "The issue here between appellants and appellees is whether Fleming's operations into Arkansas were subsequently abandoned."

We submit that this is not the whole issue. All of our argument with respect to the other states is just as applicable to Arkansas; we may rely on any ground to support the decree regardless of the fact that the District Court may have rested its holding on a ground narrower than necessary.

4.

Fleming Was Not in Bona Fide Operation in Oregon and Nebraska.

Only one observation need be made as to arguments on this point in opposing briefs (U. S.-Comm. pp. 56-65; Fleming, Dec. 10, pp. 26-29). As to these two states it is undisputed that Fleming admitted that he was intentionally violating their laws to better serve his own ends (our first brief, pp. 61-66).

There is therefore no need to consider how the Commission is to ascertain what the state law is and whether it has been violated. The laborious arguments on these subjects in the opposing briefs are inapplicable in view of the plea of guilty coupled with testimony showing the plea to be correct.

Conclusion.

One of the opposing briefs (Fleming, Dec. 10, pp. 39-40) closes with much reliance on certain language in *Illinois Central Railroad Company* v. *Interstate Commerce Commission*, 206 U. S. 441. The theory assumed to be inherent in this language appears throughout other opposing briefs. That case, however, when duly considered, affords us much support. The Commission had fixed maximum railroad rates after hearing voluminous and conflicting evidence, and the Court refused to set these aside. In distinguishing cases in which orders of the Commission had been annulled, the Court said (p. 457):

> "In *Interstate Commerce Commission* v. *Alabama Midland Railway*, 168 U. S. 144, there was passed upon a decision of the Commission that the competition of river lines of transportation was not a factor to be considered when determining whether property transported over the same line is carried under 'substantially similar circumstances and conditions,' as that

phrase is found in the fourth section of the Interstate Commerce Act. The decision was declared to be an erroneous construction of the act.

"In *Louisville & Nashville Railroad Co.* v. *Behlmer* (passing by subordinate questions) the dominant element was the construction of the fourth section of the Interstate Commerce Act. The Commission and the Circuit Court of Appeals, it was said, 'mistakenly considered as a matter of law that competition, however material, arising from carriers who were subject to the act to regulate commerce could not be taken into consideration, likewise that competition, however substantial, not originating at the initial point of the traffic, was equally as a matter of law excluded from view.'

"*In all these cases, therefore, there was a single, distinct and dominant proposition of law which the Commission had rejected, and the exact influence of which, in its decisions, could be estimated. Indeed, they were mere constructions of the statute, the delegation of the Commission's duties and power.*" (Emphasis supplied.)

It is submitted that in the instant case there is the single, dominant, question of law, the construction of the "grandfather clause," and that the evidence does not satisfy the legal requirements therein laid down. Fleming is seeking to bring himself within an exception to the general rule, and has not done so.

Respectfully submitted,

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